

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 03-80017-JEM
	:	
Sergey Zhosul,	:	CHAPTER 7
	:	
Debtor.	:	JUDGE MASSEY
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Nataliya Zhosul,	:	
	:	
Plaintiff,	:	
	:	
v.	:	ADVERSARY NO. 03-9385
	:	
Sergey Zhosul,	:	
	:	
Defendant.	:	
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Nataliya Zhosul and Defendant and Debtor Sergey Zhosul were married on February 26, 1971 in Odessa, Ukraine. In 2003, Mr. Zhosul sued Mrs. Zhosul for divorce in the Superior Court of Gwinnett County, Georgia. His attorney prepared the consent divorce decree, to which was attached the settlement agreement creating the debt that is the subject of this adversary proceeding. The state court entered the divorce decree on August 19, 2003. Mr. Zhosul remarried shortly thereafter.

In the settlement agreement attached to the divorce decree, the Zhosuls agreed that Mrs. Zhosul would receive full ownership of a house located at 1321 Kings Ridge Drive, Norcross, Georgia and a car and that Mr. Zhosul would maintain ownership of International Food Deli, Inc.

(the "Deli"). Mr. Zhosul also agreed to pay debts owed on three credit cards. At that time, the parties were jointly liable on two of those credit cards having an aggregate balance of approximately \$49,850. Only Plaintiff was liable on the third card, which had an approximate balance of \$4,500.

On September 18, 2003, a month after the divorce decree was entered, Sergey Zhosul filed a Chapter 7 petition initiating this bankruptcy case for the purpose of discharging the debt to Mrs. Zhosul created by the divorce settlement, among other debts. Nataliya Zhosul filed this adversary proceeding on December 16, 2003 to determine the dischargeability of the credit card debts under 11 U.S.C. § 523(a)(15). On July 12, 2004 the Court held a trial on this matter. After the trial, the Court gave the parties an opportunity to continue efforts to settle this dispute, but those efforts were not successful.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure, the Court makes the following findings of fact and conclusions of law.

Under section 523(a)(5) of the Bankruptcy Code, debts owed to a spouse or former spouse in connection with a divorce or separation agreement that are "actually in the nature of alimony, maintenance, or support" are not dischargeable. 11 U.S.C. § 523(a)(5). Section 523(a)(15) deals with the dischargeability of debts in the nature of property settlements arising during the course of a divorce or separation. It provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

...

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement,

divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless -

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

11 U.S.C. § 523(a)(15).

It is undisputed that Defendant's obligation to pay the credit card debt is not in the nature of alimony, maintenance, or support. The parties stipulated in the Pre-Trial Order that Defendant incurred this debt in the course of the divorce proceeding. For this reason, Plaintiff has satisfied her burden of going forward. Hence, from the commencement of the trial, Defendant had the burden of going forward and also the burden of proof. *See Gamble v. Gamble (In re Gamble)*, 143 F.3d 223, 226 (5th Cir. 1998); *In re Crosswhite*, 148 F.3d 879, 887-888 (7th Cir. 1998); *see also Brown v. Brown (In re Brown)*, 2004 Bankr. LEXIS 1274, *17 (Bankr. N.D. Ga. 2004).

The general rule that a debt covered by section 523(a)(15) is not dischargeable has two exceptions. The first exception, set forth in subsection (A), is that the debt is dischargeable if the debtor cannot pay both the debt arising from the property settlement and the debtor's other expenses "reasonably necessary . . . for the maintenance or support of the debtor or a dependent of the debtor." A debtor engaged in business is permitted to include expenses "necessary for the continuation, preservation, and operation of such business."

Ability to pay is a flexible concept that encompasses more than a debtor's current income or property. See *Humiston v. Huddelston (In re Huddelston)*, 194 B.R. 681, 688 (Bankr. N.D. Ga. 1996) ("By its focus on notions of "ability," section 523(a)(15) casts a broader net of inquiry than that which may be satisfied by a mere examination of existing income and debt.") To determine a debtor's ability to pay, a court must take into account many factors, including: (1) the disposable income of debtor at the time of trial and (2) the presence or absence of other income-generating opportunities. Cf. *Smith v. Smith (In re Smith)*, 218 B.R. 254, 259 (Bankr. S.D. Ga. 1997). A debtor must also show the amount of recurring expenses and that those expenses are reasonable and necessary for maintenance and support. Non-recurring expenses related to dischargeable debts will be ignored. Cf. *Robertson v. Dennis (In re Dennis)*, 300 F.3d 696, 704 (5th Cir. 2003) (taking into account for 11 U.S.C. § 523(a)(15)(A) analysis that some of the debtor's debts were non-dischargeable).

Thus, to prevail under section 523(a)(15)(A), a debtor must prove that the amount of income that the debtor can be expected to earn in the foreseeable future is not more than the amount of reasonable, necessary expenses for the maintenance and support of the debtor and any dependents that the debtor will incur in the same time-frame. A debtor in business may also show that any excess income is necessary to keep the business going.

Defendant purchased the Deli in August 2002 for \$78,000. He testified that the Deli's equipment had no value because of its age and that the purchase price of \$78,000 had been primarily for the Deli's name. He testified that his current inventory was worth around \$5,000. His Schedule B lists his 100% stock interest in the Deli as worthless, with a parenthetical notation that the Deli is "insolvent."

The business of the Deli is primarily the sale of Russian and European food. Mr. Zhosul testified that when he bought the Deli, many Russians lived nearby and he had little competition. He testified that many Russians now live elsewhere and that the Deli faces three new competitors all located within 7 miles. He also testified that the rent for the Deli had increased since the time he purchased the Deli.

Mr. Zhosul previously worked as a woodworker but can no longer do so because of back problems. Defendant does not have a retirement or a savings account. As of the trial, however, he owned his own house in which he has a small equity according to his Schedules.

Although the business is incorporated, Defendant treated it as a sole proprietorship. He has only one bank account, the corporate checking account. Mr. Zhosul testified that he pays his personal, as well as business, expenses out of this account. He also testified that he does not pay himself a salary but uses cash from the Deli to pay personal and business expenses.

Although Defendant testified that certain specific personal and business expenses had increased since the divorce, he provided no detailed analysis of his business expenses beyond bank statements of the corporate checking account for the months of March, April and May 2004 and unaudited financial statements for four months. He testified that the bank statements represented an accurate depiction of the Deli's income and Debtor's overall expenses, but the bank statements covered only a three month period.

The bank statements do not necessarily reflect the true picture of Debtor's income and expenses. For example, Debtor listed personal expenses in Schedule J with respect to entities not listed as creditors in Schedule F. But he wrote no checks to the financier of his automobile or to the holder of the deed on his home, and he did not write regular checks for gasoline, insurance,

dry cleaning or the support of his wife's daughter or for his mortgage, though all these monthly expenses are listed on his Schedule J. This implies that he paid such expenditures from other sources. One possible source is cash from the business. Some of these payments for expenses may have been made with a debit card. Defendant failed to show, however, that all of the cash received by the business was deposited in the bank, and he provided no credible evidence that he has accounted for the cash received by of his business.

Defendant testified that his accountant prepared the financial statements marked as Plaintiff's exhibits 7, 8, 9 and 10. Each consisted of a balance sheet, income statement, general ledger and a posting journal. Plaintiff's exhibit 10, dated January 31, 2004, also included a payroll journal. Defendant testified that these statements were correct but then undermined that assertion by stating that he did not understand them. He did not call his accountant as a witness to verify what his accountant allegedly used to prepare the statements. Both the Deli's tax return for 2003 and the income statement for December 2003 show revenue for the year of approximately \$188,000 and cost of goods sold of approximately \$112,500. Both showed a gross profit for the Deli of approximately \$76,000 and general business expenses of approximately \$45,600, leaving a net profit of \$30,000, or \$2,500 per month, for 2003. In his Schedule I, Debtor stated that his monthly income was \$3,000 per month. Thus, the financial statements do not appear to agree with Schedule I.

The problem with the proof offered by the Defendant is that he presented only bits and pieces of his financial condition for a relatively short period of time, rather than a thorough analysis of his business and how he handled the money it took in. Nor did he provide any detailed analysis of his personal expenses other than what was shown on Schedule J. Although it

is possible that Defendant's net income is no more than \$3,000 per month, the Court is unable to conclude that he lacks the income necessary to pay the debt to the credit card companies on behalf of Plaintiff. Defendant operated a cash business, took money out of the business at will, provided no reliable paper trail to verify the financial condition of his company but has a house and automobile. Yet, he claimed not to understand the financial statements of his business. On balance, the Court concludes that Defendant failed to carry his burden of proof that he could not pay the credit card bills.

Subsection (B) of section 523(a)(15) sets forth the second exception to the non-dischargeability of a domestic relations debt. It requires a debtor to show that the benefit of a discharge to the debtor outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor. Courts generally apply a "totality of the circumstances" test when analyzing this provision. *In re Crosswhite*, 148 F.3d at 888-889; *In re Gamble*, 143 F.3d 226. To make this determination, the court must examine the present and likely future income and expenses of both the debtor and the former spouse, *Royer v. Smith (In re Smith)*, 278 B.R. 253, 261 (Bankr. M.D. Ga. 2001), and, if raised by one of the parties, their relative net worths.

The detriment to Plaintiff in discharging the debt is that Plaintiff might be sued by the credit card companies and might have to pay the debt. Although those companies had indicated a willingness to write off a sizeable percentage of the debt, there is no evidence to show that they are still willing to do so. Plaintiff possibly could pay off the debt or some of it if she liquidated all of her assets, but the evidence shows that she lacks sufficient income to pay off the debt over time. She credibly testified that she was losing her job. There is no evidence to show that she would be able to find another job paying as much money. She testified that she got some

financial assistance from her daughter and son-in-law, but there is no evidence to show that such assistance would continue or be sufficient to enable her to pay the credit card debt. Thus, the likely detriment to Plaintiff if Defendant does not pay the credit card debt, or at least a large portion of it, will be that Plaintiff would lose her house and/or other assets.

The benefit to Defendant if the debt is discharged is that he would emerge from bankruptcy solvent with, according to his schedules, a house and a 2003 car that he purchased for over \$23,000. But Defendant has not demonstrated that he would not have future income to pay the debt for the reasons stated above.

There is little doubt that Plaintiff has a higher net worth than Defendant but not so much higher to permit Plaintiff to pay the debt without having to sell her home. Under these circumstances, the disparity in net worths is not a basis for finding that the detriment to Plaintiff is outweighed by the benefit to Defendant where Defendant has failed to show that he does not have the ability to pay the debt over time.

Debtor's debt to Plaintiff imposed by the divorce decree is not dischargeable under 11 U.S.C. § 523(a)(15). The Court will enter a separate judgment.

IT IS SO ORDERED.

This 4th day of March 2005.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE